

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**ANTHONY GOERDT**  
Claimant

**APPEAL NO: 17A-UI-02187-JE-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**LOWE'S HOME CENTERS LLC**  
Employer

**OC: 01/29/17**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the February 14, 2017, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on March 21, 2017. The claimant did not respond to the hearing notice and did not participate in the hearing. Ann Northrup, Human Resources Manager and Brad Kleinschmidt, Assistant Store Manager, participated in the hearing on behalf of the employer.

**ISSUE:**

The issue is whether the employer discharged the claimant for work-connected misconduct.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time customer service associate for Lowe's Home Centers from February 5, 2016 to January 31, 2017. He was discharged for failing a drug screen following an OSHA reportable injury January 10, 2017 (Iowa Code section 730.5(1)h(5)). The claimant reported he injured his back January 11, 2017, and consequently he was subjected to a saliva drug screen administered by Human Resources Manager Ann Northrup in her office before he was sent to the employer's physician for treatment (Iowa Code section 730.5(7)a). The claimant's saliva test was not split at the time of collection and the claimant was not given the opportunity to provide information that might affect the test results or the drugs the employer would be testing for, although Ms. Northrup does not know if the medical review officer provided the claimant the chance to do so and the list of drugs he would be tested for (Iowa Code sections 730.5(7)b and 730.5(7)c(2)). The claimant volunteered that after he hurt his back he took some medication he had left over from when he broke his leg a few years ago. The employer sent the saliva test to Qwest Diagnostics. There is no evidence of a confirmed positive test before disciplinary action occurred (Iowa Code section 730.5(7)i(1)). The employer does not know if the certified laboratory uses a different chemical process than the initial screen. Qwest Diagnostics notified the employer the claimant's test was positive, but the information did not say for what he tested positive. If a confirmed positive drug test result is received by the employer, the employer must notify the claimant by certified mail, return receipt requested of the results of the test and the claimant's right to request and obtain a confirmatory test of the secondary sample (Iowa Code section 730.5(7)i(1) and (2)). The claimant has the right to

choose the certified lab that will do the confirmatory test at the claimant's expense which must be comparable to the costs of the employer's initial test. The claimant must make the request within seven days from the date of the mailing of the retesting rights notice. The employer did comply with having a written drug and alcohol policy, uniform actions that will be taken in case of a confirmed positive test or refusal to submit to testing; an awareness program such as EAP, and maintains a resource file of treatment programs, etc. The employer notified the claimant January 30, 2017, that his employment was terminated due to a positive drug test.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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The employer has the burden of proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Misconduct must be substantial in order to justify denial of unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1990).

Iowa Code section 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. In *Eaton v. Employment Appeal Board*, 606 N.W.2d 553 (Iowa 1999), the Supreme Court of Iowa considered the statute and held "that an illegal drug test cannot provide the basis to render an employee ineligible for unemployment compensation benefits." Thereafter, in *Harrison v. Employment Appeal Board*, 659 N.W.2d 581 (Iowa 2003), the Iowa Supreme Court held that where an employer had not complied with the statutory requirement for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits. In the present case, the employer requested the drug test based on the claimant's OSHA reportable accident, but the employer failed to comply with Iowa Code section 730.5. Accordingly, the drug test was not authorized by law and cannot serve as the basis to disqualify the claimant from unemployment insurance benefits.

The evidence in the record clearly establishes that the claimant was not informed by certified mail, return receipt requested, of the test results and the right to be retested to obtain a confirmatory test of the secondary sample under the appropriations of section 730.5(7)(i)(1) and (2), which require that if a confirmed positive test result is received by the employer, the employer must notify the employee by certified mail, return receipt requested, of the results of the test and the right to be retested and to obtain a confirmatory test of the secondary sample. The employee must be informed that he may select a certified lab of his own choosing, that the fee, while payable by the employee, be comparable in cost to the employer's initial test, and that the employee has seven days from the date of mailing to assert his right and request to be retested.

The Supreme Court of Iowa in the case of *Jerrie Laverne Sims v. NCI Holding Corporation, et al.*, No. 07-1468, Filed January 9, 2009, held that strict compliance with the notice provision of section 730.5, the Drug Free Workplace Statute, is required. The court held that the notice requirement within the statute focuses more directly on the protection of employees who are required to submit to drug testing and that section 730.5(7)(i)(1) accomplishes the protective purpose of the statute by mandating written notice by certified mail of (1) any positive drug test, (2) the employee's right to obtain a confirmatory test, and (3) the fee paid by the employee to the employer for reimbursement of the expense of that test. The court held that such a formal notice conveys to the addressee "a message that the contents of the document are important

and worthy of the employee's deliberate reflection." In deciding whether a substantial compliance has taken place, the court cited *Harrison v. Employment Appeal Board*, 659 N.W.2d 581, 586 (Iowa 2003) in stating "although an employer is entitled to have a drug free workplace, it would be contrary to the spirit of Iowa's drug testing law if we were to allow employers to ignore the protections afforded by this statute..."

The court concluded that the verbal notice provided by NCI at the time of Sims' termination regarding the right to have the retesting of the sample was insufficient to convey to Sims all of the employee protections afforded by section 730.5(7). The court held that although Sims was verbally informed of the right to undertake a confirmatory test, the verbal notice was incomplete and failed to adequately convey the message that the notice was important. It was noted that a written notice sent by certified mail conveys the importance of the message and the need for deliberate reflection. The court further held that NCI did not come into substantial compliance with the statutory obligation under section 730.5(7) when it sent a written notice to Sims several months after he was discharged. The court concluded that verbal notice provided at that time of termination was insufficient to convey to Sims all of the employee protections afforded by section 730.5(7). It held that although the verbal notice informed the employee of his right to take a confirmatory test, the verbal notice was incomplete and did not adequately convey the message the notice was important.

In view of the strict position taken by the Iowa Supreme Court in the *Sims* case, the administrative law judge concludes that the employer in this case did not establish strict nor substantial compliance with section 730.5 of the Drug Free Workplace Statute. Because the employer did not send the claimant a certified letter, return receipt requested, of the positive test, it did not comply with Iowa Code section 730.5, and the test was not authorized by law and cannot serve as the basis for disqualifying the claimant from unemployment insurance benefits. Based upon the evidence in the record and the application of the appropriate law, the administrative law judge must conclude that the claimant was discharged for no disqualifying reason. Accordingly, benefits are allowed.

**DECISION:**

The February 14, 2017, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

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